(1) No. .....

Supreme Court, U.S.
FILED

IN THE 93 2025 MAY 24 1994

OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION

and COUNTY OF MENDOCINO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

JAMES REYER, ESQUIRE
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Counsel for Petitioner

54pp

QUESTIONS PRESENTED

1. Whether the failure of a state court of appeal in its November 22 Decision (1) to find either a "wrongful act" of refusal by Petitioner to attend a yet to be scheduled second medical examination or (2) to find a right in the state statute under review for a county retirement board to order a second and possibly third medical examination to determine "the existence of disability," in affirming a state superior court preliminary injunction, compelling Petitioner to attend that second medical examination, deprived Petitioner of her right to Due Process of Law, secured by the Fourteenth Amendment, when Petitioner's substantive physical and psychological medical privacy rights are themselves specifically secured from

invasion under Article I, Section 1, the Constitution of the State of California?

2. Whether a state appellate court may license the use of equity as a remedy in the conspicuous absence of the finding of a "wrongful act" and in the equally conspicuous absence of the finding of a right for a county retirement board to order a second medical examination to determine "the existence of disability" in an administrative review of an application for retirement benefits, when there has by the failure of such findings been no statement of a cause of action, and the invoking of equity to enforce compliance with an undetermined right in the absence of a cause of action is arbitrary and capricious, inconsistent with Petitioner's rights to procedural Due Process of Law, secured by the Fourteenth Amendment?

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CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES

FOURTEENTH AMENDMENT
UNITED STATES CONSTITUTION 5,7

ARTICLE I, § 4
CALIFORNIA CONSTITUTION 5,7,8

California Government Code,
Section 31723 6,8,13,14,15

No.

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

JUDITH SPALETTA,
Petitioner,

v.

COUNTY OF MENDOCINO EMPLOYEES
RETIREMENT ASSOCIATION
and COUNTY OF MENDOCINO,
Respondents.

PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEAL,
STATE OF CALIFORNIA
FIRST DISTRICT, DIVISION FOUR

Petitioner Judith Spaletta respectfully prays that a Writ of Certiorari issue to review the November 22 Decision of the state court of appeal, affirming a state superior court preliminary mandatory injunction, compelling Petitioner to attend a second medical examination affecting her state constitutionally secured

rights to physical and psychological medical privacy.

COURT DECISION AND ORDERS AND ADMINISTRATIVE ORDERS BELOW

The state court of appeal decision, entered November 22, 1993 (the "November 22 Decision"), which is not published in official reports, is set forth at Pages A1-A14 of the Appendix. The state court of appeal order, entered December 20, 1993, denying Petitioner's petition for rehearing is set forth at Page A15 of the Appendix.

The March 15, 1993 order of the state superior court that is the subject of the state court of appeal November 22 Decision, which is not published in official reports, is set

forth at Pages A17 - A18 of the Appendix.

The May 22, 1993 administrative order of the retirement administrator, ordering Petitioner to multiple medical examinations that the court of appeals properly found in its November 22 Decision was ruled by the superior court to be an illegitimate order, which is not published in official reports, is set forth at Pages A21 - A23 of the Appendix.

The August 12, 1993 motion of the retirement board board of directors, ordering a single joint medical examination before two (2) doctors, without setting the time, date and place for such an examination, which is not published in official reports, is set forth at Pages A24-A25 of the Appendix.

The August 21, 1993 administrative order of the chairman and retirement administrator, ordering multiple medical examinations without setting the time, date and place for those examinations, which is not published in official reports, is set forth at Pages A26 - A27 of the Appendix.

The February 23, 1994 order of the Supreme Court of the State of California, denying Petitioner's discretionary petition for review before the state court of last resort, which is not published in official reports, is set forth at Page A16 of the Appendix.

JURISDICTION

The order of the Supreme Court of the State of California was entered on February 23, 1994. Jurisdiction of this Court is invoked under 28 U.S.C.

1257, 28 U.S.C. 2101 (c) and Supreme Court Rules 13.1 and 13.4.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTE

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

"Section 1. . . .
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE I, SECTION 1

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

California Government Code,
Section 31723

"Right to require proof of disability. The board may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of disability."

STATEMENT OF THE CASE

A. Nature of the Case

This case is about whether state courts will protect an average citizen from the invasion of her physical and psychological person.

This case is about whether the constitutionally secured medical privacy rights of an average person will be honored -- or will be breached with careless indifference.

The state appellate court in its November 22 Decision affirming a preliminary mandatory injunction of a

trial court, ordering Petitioner to a second and possibly third medical examination (1) failed to find that Petitioner engaged in a "wrongful act" supporting such an injunction and (2) failed to find a right in the state statute under examination for a county retirement board to order a second medical examination to determine "the existence of disability." November 22 Decision, at Appendix Pages A1 - A14.[1]

---

[1] The issue of the deprivation of Petitioner's right to Due Process of Law, secured by the Fourteenth Amendment to the United States Constitution, and deprivation of her accompanying substantive medical privacy rights to her physical and psychological person, secured by the Constitution of the State of California, was first raised in Petitioner's petition for review with the Supreme Court of the State of California, immediately after the state appellate court denied Petitioner's petition for rehearing. Petitioner's Petition for Review, at Pages 1 and 2.

B. Petitioner's physical and psychological medical privacy rights are secured from invasion by Article I, Section 1, of the Constitution of the State of California.

Petitioner under the Constitution of the State of California has the inalienable substantive right to pursue and obtain privacy. Article I, Section 1, Constitution of the State of California. See Page 5 hereof.

In accordance with her application for physical disability presently before the retirement board, Petitioner has already submitted to the board the single medical examination required by the board under California Government Code, Section 31723, to determine "the existence of disability." See Pages 12 to 13 hereof.

Notwithstanding the fact that the review of Petitioner's application for retirement disability is a simple

administrative procedure reviewing her application for physical disability retirement, even in cases of plenary litigation, the state constitutional right of privacy does not permit discovery of private information that is not relevant to the ongoing litigation and, when relevant, the scope of disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed in the least intrusive manner. Davis v. Superior Court (Williams) 7 Cal. App. 4th 1008, 9 Cal. Rptr. 2d 331, 334, 335, citing inter alia Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404; Britt v. Superior Court (1978) 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 and Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 242 Cal. Rptr. 231.

C. The November 22 Decision

1. No Finding of a "Wrongful Act."

The state court of appeal in its November 22 Decision fails in its findings of fact to find that Petitioner engaged in a "wrongful act" justifying injunctive relief. The sole declination by Petitioner to attend a medical examination recognized by the November 22 Decision is one that the trial court ruled was justified by Petitioner, because the May 22 underlying administrative order was issued by the retirement administrator rather than by the Association's board of directors:

> "At the same time, the County applied to the Association on her behalf for disability retirement. Retirement Administrator Tim Knudson ordered Spaletta to submit to a medical examination. When Spaletta refused, the Association requested an injunction compelling her to attend the examination. The

> court sustained Spaletta's demurrer to the complaint with leave to amend, ruling that the Association's complaint failed to state a claim because an underlying administrative order was issued by the retirement administrator rather than the Association's board of directors."
>
> November 22 Decision, at Page A3.

The November 22 Decision in its section entitled "FACTS" recognizes that Petitioner did not commit a "wrongful act" in her declination to comply with the May 22 Tim Knudson administrative order. The November 22 Decision in its "FACTS" does not determine that Petitioner refused to attend any medical examination under the first and second amended complaints. None were ever scheduled. See November 22 Decision, "FACTS," at Appendix Pages A2 - A5.

2. Second and third medical examinations neither (1) scheduled nor (2) authorized by board of directors.

The August 21 administrative order, attached as Exhibit I to the second amended complaint that is the subject of the November 22 Decision, documents that the second and third medical examinations were not authorized by the August 12 motion of the board of directors, attached as Exhibit H to and referred to in that second amended complaint. See August 21 administrative order, at Appendix Pages A26 - A27. Compare with August 12 motion of board of directors, at Appendix Pages A24 - A25.

3. Petitioner had already supplied the retirement board at her own expense with a medical examination required by the Standard Application of the retirement board to prove the existence of her disability, the single medical examination

permitted by California Government Code, Section 31723.

Petitioner Spaletta, to prove the existence of her physical disability, has already supplied the retirement board with the single medical examination permitted by California Government Code, Section 31723. See Section 31723, at Page 6 hereof.

This medical examination at Petitioner's own expense was required by Section C of the Board's Standard Application for Disability Retirement. See Appendix Pages A19 - A20.

4. The November 22 Decision fails to find in the state statute under examination in the appeal of the injunctive order authority to order a second and third medical examination to determine "the existence of disability."

The statutory framework created by the state legislature in delegating authority to the retirement board to

determine the existence of Petitioner's physical disability clearly relies upon a single physical examination for the sole purpose of proving "the existence of disability[:]"

> "§ 31723. Right to require proof of disability.
>
> "The board may require (emphasis added) such proof, including a medical examination at the expense of the member (emphasis added), as it deems necessary or (emphasis added) the board upon its own motion may order a medical examination to determine the existence of disability (emphasis added)."

Nevertheless, the state appellate court in its November 22 Decision ignores the disjunctive delegation to the board of power to require a medical examination at the expense of the member or upon motion to order a medical examination "to determine the existence of disability."

The November 22 Decision also ignores (1) that medical examination may be required only "to determine the existence of disability," and (2) its prior finding that the trial court had ruled that the underlying May 22 administrative order was illegitimate and Petitioner's declination to submit to that illegitimate order was reasonable and well-founded:[2]

> "The board had a right to order a medical examination to determine whether Spaletta suffered injury during the course of employment. (See Gov. Code, § 31723. (emphasis added) Her refusal to submit to the examination constituted a wrongful act."
> November 22 Decision. Appendix Pages A4-A5.

---

2 The sole finding of a declination by Petitioner made by the November 22 Decision is Petitioner's refusal to submit to an underlying administrative order issued by the retirement administrator rather than the retirement board's board of directors, ruled by the trial court to be an illegitimate order.
November 22 Decision, at Appendix Pages A1 - A14. See also Page 3 hereof.

The failure of the court of appeal to find either a "wrongful act" or find a right of a retirement board to order a second medical examination "to determine the existence of disability" invalidates under Bank of America v. Williams (1948) 89 Cal. App. 2d 151, 153, cited in the November 22 Decision and Willis v. Lauridson (1911) 161 Cal. 106, 118 P. 530 referred to therein, the implementation of an injunctive order against Petitioner's medical privacy rights. November 22 Decision, at Appendix Page A7.

REASONS FOR GRANTING WRIT

(1) Certiorari should be granted, because the state appellate court in an appeal of a lower court mandatory injunction ordering a prospective invasion of Petitioner's physical and psychological medical privacy rights, secured specifically in the California Constitution, has decided its November 22 Decision contrary to the legal standards for granting equitable relief

stated therein and in conflict with Petitioner's right to Due Process of Law, secured by the Fourteenth Amendment to the United States Constitution and the decisions of this Court with respect thereto.

Procedural Due Process necessitates a reasoned decision to provide the assurance (critical to fairness as well as the appearance of fairness) that a decision depriving a litigant of a right implicating a fundamental constitutional right, specifically secured by the state constitution of the state in question, is not capricious and is based on an evaluation and close scrutiny of the fairly presented record in the action at hand. Wolf v. McDonnell, 418 U.S. 539, 563-565 (1974). Morrisey v. Brewer, 408 U.S. 471, 489 (1972). Arizona v. Washington, 434 U.S. 497, 517 (1978).

Petitioner under the Constitution of the State of California has the specifically secured inalienable and fundamental right to privacy to her physical and psychological person. See Statement of the Case, Part B., at Pages 8 and 9 hereof.

The November 22 Decision of the state appellate court arbitrarily attempts to strip that substantive right to medical privacy from Petitioner's grasp without cautiously determining the right of a pension board in a pension application proceeding to require a second, extra medical examination (and possibly a third) and without finding a "wrongful act" upon which to base injunctive relief for a yet to be scheduled second, extra medical examination. See Statement of the Case, Part C., at Pages 6 to 16 hereof.

The failure of the state appellate court to find a "wrongful act" and the equally significant failure of that court in its November 22 Decision to find statutory authority for the retirement board to order a second, extra medical examination "to determine the existence of disability" can only be viewed as an arbitrary denial of Petitioner's right to medical privacy. Postal Telegraph Cable Co. v. City of Newport, Ky., 247 U.S. 464 (1918). See also Tracy v. Ginzberg, 205 U.S. 170, 178 (1907) and Patterson v. Colorado Ex Rel. Atty. Gen., 205 U.S. 459, 464-465 (1907) (Justice Harlan dissenting).

The ungainly failures in the November 22 Decision of the state appellate court to find a "wrongful act" and to determine a statutory right out of which any wrongful act would be a necessary antecedent can in no sense

satisfy the fundamental principle that injunctions ought not issue unless the right alleged to be invaded or threatened is clear:

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that ought never to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened so as to be averted only by the protecting preventative process of injunction." Baldwin's Rep. 218.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the state appellate court November 22 Decision.

In the alternative, Petitioner respectfully requests this Court, in accordance with Supreme Court Rule 16.1, to summarily reverse the court of appeal November 22 Decision and direct the court of appeal to reverse the March 15, 1993 order of the superior court.

Dated: May 24, 1994

Respectfully submitted,

/s/ James Reyer, Esq.

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(707) 576-1244

Counsel to Petitioner

APPENDIX

DECISIONS ORDERS AND APPLICABLE DOCUMENTS OF RECORD

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

FILED
NOV 22 1993

MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al.,
Plaintiffs and Respondents,

v. A061726

JUDITH SPALETTA,
Defendant and Appellant.
Mendocino County
(Super. Ct. No. 64981)

Respondents Mendocino County Employees' Retirement association (Association) an the County of Mendocino (County) sought an injunction to compel Judith Spaletta to submit to a

medical examination in order to determine her eligibility for disability retirement. The trial court granted the mandatory preliminary injunction. Spaletta appeals, contending that the trial court erred by (1) invoking its equitable jurisdiction because the Association's claims were dubious; (2) admitting incompetent and hearsay evidence; and overruling her demurrer to the complaint. We affirm the judgment.

I. FACTS

Appellant Judith Spaletta worked as a microfilm clerk in the office of the Mendocino County Clerk/Recorder. She was /1/ exposed to a number of toxic environmental factors in the County courthouse which Spaletta alleged left her totally and permanently disabled. After a four-year leave of absence, Spaletta failed to return to work and

the County tried to terminate her. Spaletta appealed to the County's civil service commission, which transferred the matter to the Association.

At the same time, the County applied to the Association on her behalf for disability retirement. Retirement Administrator Tim Knudson ordered Spaletta to submit to a medical examination. When Spaletta refused, the Association requested an injunction compelling her to attend the examination. The court sustained Spaletta's demurrer to the complaint with leave to amend, ruling that the Association's complaint failed to state a claim because an underlying administrative order was issued by the retirement administrator rather than the Association's board of directors.

The board then ordered Spaletta to

submit to the medical examination and the Association filed its first amended complaint. Spaletta again demurred to the complaint which was again sustained with leave to amend. The court held that the, as Spaletta's employer, should be a party to the lawsuit to determine whether the complaint stated a claim.

The County joined the suit and a second amended complaint was filed. The Association filed an application for an order to show cause why the preliminary injunction should not be granted. The Association's administrator filed a /2/ declaration in support of that application. Spaletta demurred to this complaint on the ground that the County failed to state a cause of action. The trial court overruled the demurrer and partially granted the preliminary

mandatory injunction. The court ordered Spaletta to appear for a medical examination by any physician chosen by the Association, as long as the place of the examination was no further from Spaletta's home than the office of her treating physician who was located 75 miles away.

II. EQUITY

First, Spaletta contends that the trial court erred in invoking its equitable jurisdiction in this case because the County's claims were dubious. Specifically, she argues that: (1) there is no legal authority for courts to enforce orders by the retirement board, (2) the Association stated no cause of action, and (3) the County made no adequate showing of injury and stated no cause of action.

We consider each of these contentions in turn.

It has long been recognized in administrative matters that a retirement board has a valid independent right to make its own determination about whether an applicant suffered injury in the course and within the scope of his or her employment. (Summerford v. Board of Retirement (1977) 72 Cal.App.3d 128, 132.) The board may require this proof, including a medical examination at the applicant's expense, as is deemed necessary or the board, on its own motion, may order an examination to determine the existence of disability. /3/ (See Gov. Code, § 31723.)

There is no explicit statutory authority permitting courts to enforce board-ordered medical examinations. However, this authority can be inferred

from the courts' broad equitable powers. Equity will provide a remedy when there is a wrongful act constituting the cause of action, and a showing of the inadequacy of the remedy at law. (See Bank of America v. Williams (1948) 89 Cal.App.2d 21, 23 [complaint must state cause of action]; Golden Gate S. T., Inc. v. San Francisco (1937) 21 Cal.App.2d 582, 584 [no injunction may issue if plaintiff has adequate remedy at law]; see also 5 Witkin, Cal. Procedure (3d ed. 1985), Pleading, § 774, pp. 218-222.) The board had a right to order a medical examination to determine whether Spaletta suffered injury during the course of employment. (See Gov. Code, § 31723.) Her refusal to submit to the examination constituted a wrongful act. Money damages were not available to compensate

for Spaletta's refusal to obey the order, so equitable remedies are appropriate. (See, e.g., Golden Gate S. T., Inc. v. San Francisco, supra, 21 Cal.App.2d at p. 584.) The lack of an adequate remedy for Spaletta's refusal to obey the order stems from the fact that, without the results of the medical examination, the retirement board does not have sufficient evidence to evaluate her application. As a result, any decision the board makes would be immediately vulnerable to challenge for lack of proper evidentiary basis. /4/

We find that the Association has stated a valid cause of action and the court's exercise of equitable jurisdiction was appropriate. If we were to hold otherwise, the board's authority to order medical examinations would be meaningless. Applicants could

refuse to be examined and leave the board without the necessary evidence to make a valid disability determination. We are satisfied that the trial court's equitable jurisdiction extends to compelling employees to submit to medical examination in appropriate circumstances.

The County has also made a showing sufficient to merit exercise of the court's equitable jurisdiction. Spaletta has been on leave without pay for almost seven years and her disability application has been pending for two years. Her refusal to submit to the medical examination leaves the County in limbo regarding her status as an employee. If the board denies her application on the basis that she is not physically or mentally incapacitated, the County must either reinstate

Spaletta or file a petition for writ of mandate against the Association for reaching its conclusion on an inadequate record. (See Gov. Code, § 31725.) The absence of an adequate remedy at law is a reason for the exercise of equity jurisdiction. (Bond v. Bulgheroni (1932) 215 Cal. 7, 10.) As both the Association and the County make adequate showings of injury and stated valid causes of action, the trial court's injunction was proper. /5/

III. EVIDENCE

Spaletta next contends that the trial court erroneously admitted incompetent and hearsay evidence. In particular, she complains that Retirement Administrator Tim Knudson's statements in support of an application for an order to show cause consisted of facts not personally known to him.

In his declaration, Knudson stated that he "believe[d]" Spaletta traveled to the Bay Area and to Sacramento to receive medical attention. However, this statement did not go to the issue of whether injunctive relief was proper, but to the distance Spaletta should be required to travel for her medical examination. The trial court considered Knudson's testimony, but apparently gave more credence to Spaletta's evidence suggesting that a more limited scope of travel would be appropriate. The court ruled that Spaletta should be ordered to travel "no farther from her residence than the distance from her residence to that of her treating physician" in Corte Madera -- about 75 miles. Consequently, whether Kundson's testimony was based on personal knowledge is irrelevant because the court ruled in Spaletta's favor on

this issue. If there is any error, it was necessarily harmless.

Spaletta also contends that Knudson did not competently testify, as the complaint alleged, that the Association did "not have before it the evidence necessary to make a determination as to whether Judith Spaletta is permanently incapacitated for the performance of her duties /6/ ...." She argues that his testimony on this issue was conclusory and, because he did not testify to the facts on which these conclusions were based, the Association lacked sufficient facts to support an order for injunctive relief. This contention lacks merit.

Complaints need only contain a sufficient statement of the ultimate facts to satisfy the court that there exist grounds for temporary relief. (See Porters Bar Dredging Co. v. Beaudry

(1911) 15 Cal.App. 751.) Evidentiary allegations are unnecessary and improper in a complaint. Here, Knudson's testimony does not include detailed evidence supporting the allegations in his affidavit. However, such allegations are not required to sustain the complaint. Because Knudson's statements were supported by sufficient facts to satisfy the court that grounds for relief existed, the trial court properly sustained the injunction.

IV. DEMURRER

Finally, Spaletta contends that the trial court should have sustained the demurrer because neither the County nor the Association stated a cause of action in equity in their second amended complaint. As we have already found that both did state valid causes of

action, the trial court properly overruled Spaletta's demurrer.

V. CONCLUSION

The preliminary injunction is affirmed. /7/

Reardon, J.

WE CONCUR:

Anderson, P.J.

Poche, J.

A061726 /8/

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 4

MENDOCINO COUNTY EMPLOYEES' RETIREMENT
vs. SPALETTA, JUDITH A061726
Mendocino County No. 64981

FILED
DEC 20, 1993

BY THE COURT:

The petition for rehearing is denied.

Dated: DEC 20, 1993

Anderson, P.J.

First Appellate District, Division Four,
No. A061726
S037061

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION Et Al., Respondents

v.

JUDITH SPALETTA, Appellant

SUPREME COURT
FILED
FEB 23 1994
Robert Wandruff Clerk

DEPUTY

Appellant's petition for review is DENIED.

LUCAS

Chief Justice

448

FILED
MAR 15 1993
Mendocino
Superior
Court Clerk
by _____

Phyl Allen Diri Bar number 100587
Attorney at Law
303 South Hortense Street
Ukiah, CA 95482
(707) 468-5368

Attorney for Defendant/Cross-complaintant
JUDITH SPALETTA

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MENDOCINO

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION, and COUNTY OF MENDOCINO

Plaintiffs,

v.
JUDITH SPALETTA,
Defendant.

No. 64981

ORDER

GOOD CAUSE appearing, it is hereby ordered that:

1. **DEMURRER.** The demurrer to the Second Amended Complaint is overruled.

2. **Preliminary Mandatory Injunction.** Judith Spaletta is ordered to submit to a medical examination at a distance no farther from her residence than the distance from her residence to that of her treating physician. The defendant is not ordered to have a psychiatric examination. Denial of plaintiffs' request for a psychiatric examination is without prejudice to renewal of the request following the completion of the physical examination if there is a showing of need for such examination. The physical examination by a board-selected specialist may rule out the necessity of such an examination or in the alternative may provide a basis for making a valid request for such an examination.

Dated: March 15, 1993

Conrad L. Cox
Judge of the Superior Court

RETIREMENT BOARD STANDARD APPLICATION REQUIRING SINGLE MEDICAL EXAMINATION REQUIRED UNDER CALIFORNIA GOVERNMENT CODE, SECTION 31723, A MEDICAL EXAMINATION ALREADY SUPPLIED TO RETIREMENT BOARD BY PETITIONER AT HER OWN EXPENSE

C. NATURE OF INJURY OR DISEASE

The following information must be supplied (emphasis added) to the Retirement Board to assist them in determining the nature and extent of the Member's disability:

1. In your own words, describe the medical nature of the Member's injury or illness.

_____

_____

2. A medical report from the physician describing the nature and extent of the illness or injury. (emphasis added) (The physician and the Retirement Board should be furnished a detailed description of the Member's job.)

3. Other medical reports or results of any other examination that the Member may have had in connection with this illness or injury.

. . . .

MAY 22 TIM KNUDSON ADMINISTRATIVE ORDER RULED ILLEGITIMATE AND UNAUTHORIZED BY LOWER COURT FOR WANT OF AUTHORIZATION BY BOARD OF DIRECTORS OF RETIREMENT BOARD

ANTHONY E. GRAHAM, ESQUIRE
GRAHAM, CONE, MCKINSEY, ROBERTS & JACKSON
45060 UKIAH STREET
POST OFFICE BOX 1090
MENDOCINO, CALIFORNIA 95460

ATTORNEYS FOR COUNTY OF MENDOCINO EMPLOYEES' RETIREMENT ASSOCIATION

IN RE THE MATTER OF

MARSHA YOUNG EMPLOYER OF
JUDITH SPALETTA,
APPLICANT.

DEMAND FOR MEDICAL EXAMINATIONS

GOVERNMENT CODE SECTION 31723

TO JUDITH SPALETTA AND PHYL DIRI,

HER ATTORNEY OF RECORD:

Pursuant to the provisions of Government Code Section 31723, the Mendocino County Employees' Retirement Association hereby orders the following

medical examination to determine the existence of the disability:

DR. ABBA TEER, M.D., IMMUNOLOGIST

DATE: THURSDAY, JULY 16, 1992

TIME: 1:45 P.M.

PLACE: DR. ABBA TEER'S OFFICE
450 SUTTER STREET, SUITE 2534
SAN FRANCISCO, CALIFORNIA

ANDREW D. WHYMAN, PSYCHIATRIST

DATE: FRIDAY, JULY 17, 1992

TIME: 10:00 A.M.

PLACE: DR. ANDREW WHYMAN'S OFFICE
1 DANIEL BURNHAM COURT SUITE 345-C
SAN FRANCISCO, CALIFORNIA

Judith Spaletta is hereby ordered to attend the examination as stated above.

Dated: May 22, 1992

Timothy Knudson, Retirement Administrator

/1/

(CT 63)

August 12 Motion of Retirement Board Board of Directors on August 12, 1993 requiring attendance at a single joint medical examination without setting time, date or place

6. ATTORNEY PHIL DIRI

A. Attorney Phil Diri and Judith Spaletta entered the meeting at 10:05 AM. After lengthy discussion regarding the doctors used by the retirement board. The following motion was made by Knudsen and seconded by King, "Pursuant to Government Code Section #31723 that Judith Spaletta be required to attend a medical examination with Drs. Abba Teer and Andrew Whyman. That the retirement association will reimburse Judith Spaletta reasonable travel expenses."

Roll call vote as follows: Ayes:Carter, Worster, King, Duman, Kunudsen. Noes: Lucido, Pintant. Absent: Hickey, Butcher. Motion carried 5-2.

Attorney Diri and Mrs. Spaletta left the meeting at 10:30 am.

(CT 274)

AUGUST 21 ADMINISTRATIVE ORDER ORDERING SECOND AND THIRD MEDICAL EXAMINATIONS WITHOUT SETTING TIME, PLACE OR DATE

ANTHONY E. GRAHAM, ESQ., BAR NO. 61324
GRAHAM, CONE, MCKINNEY, ROBERTS & JACKSON
45060 UKIAH STREET
POST OFFICE BOX 1090
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Telephone: (707) 937-0503

Attorneys for COUNTY OF MENDOCINO EMPLOYEES' RETIREMENT ASSOCIATION

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MENDOCINO

COUNTY OF MENDOCINO EMPLOYEES' RETIREMENT ASSOCIATION,
Plaintiff,

vs.

JUDITH SPALETTA,
Defendant.

Case No. 64981

ORDER FOR MEDICAL EXAMINATION PURSUANT TO GOVERNMENT CODE §31723

TO JUDITH SPALETTA AND PHYL DIRI, HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that pursuant to

the provisions of Government Code §31723, the MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION does hereby order that Judith Spaletta attend medical examinations with Dr. Andrew Whyman and Dr. Abba Teer at a date and time to be scheduled.

Dated: August 31, 1992

STEVE DUMAN
Chairman of the Mendocino Employees' Retirement Association

Dated: August 21, 1992

TIMOTHY J. KNUDSEN
Retirement Administrator
MENDOCINO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

(CT 275)

Supreme Court, U.S.
FILED
JUL 5 1994
OFFICE OF THE CLERK

No. 93-2025

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCATION and COUNTY OF MENDOCINO,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal
State of California
First Appellate District

BRIEF IN OPPOSITION

JONE LEMOS JACKSON, ESQUIRE (SBN: 135210)
GRAHAM, CONE, McKINNEY
ROBERTS & JACKSON
Post Office Box 1090
Mendocino, California 95460
Telephone: (707) 937-0503

Counsel for Respondent
COUNTY OF MENDOCINO EMPLOYEES
RETIREMENT ASSOCIATION

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the California Court of Appeal properly found that Petitioner wrongfully refused to submit to a medical examination ordered by the County Employees Retirement Association.

2. Whether the California Court of Appeal decision violates Petitioner's right of privacy.

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No. 93-2025
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

JUDITH SPALETTA
Petitioner,

v.

COUNTY OF MENDOCINO EMPLOYEES
RETIREMENT ASSOCIATION
and COUNTY OF MENDOCINO,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

JURISDICTION

Respondent COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION ("ASSOCIATION") disputes that jurisdiction has been properly invoked in this case. Petitioner states that jurisdiction is sought pursuant to

28 U.S.C. §1257. That section provides that review is proper where the validity of a State statute is questioned on the ground of its being repugnant to the United State Constitution. Petitioner does not contend in her Petition that the subject State statute, California Government Code §31723, violates the United States Constitution.

Furthermore, Supreme Court Rule 10 sets forth three categories of reasons for granting a petition for writ of certiorari, none of which are applicable here. First, there is no United States Court of Appeals decision involved here. Second, no federal question has been decided by the California Courts in this case. Third, no important question of federal law, not yet settled by this

Court, has been decided by the California courts in this case.

This case does not present grounds for exercise of jurisdiction by this Court, and the petition accordingly should be denied.

STATEMENT OF THE CASE

The California County Employees Retirement Law of 1937 sets forth the standards by which a public employee may be deemed eligible for disability retirement. This statutory scheme is set forth in California Government Code §§31720 et seq. Of particular relevance here is §31725, which states that it is up to the Board of Directors of the County Retirement Association to determine whether an applicant for disability retirement is in fact permanently incapacitated for the

performance of duty, and §31723, which allows the Board to order an applicant to be medically examined to determine whether a disability exists.

The Association did order Petitioner to be medically examined. She refused to be examined. The Association obtained an injunction from the Superior Court mandating Petitioner's attendance at the Association-ordered exam. The Court of Appeal upheld the Superior Court's decision. The California Supreme Court refused to review the case.

Now Petitioner seeks review by this Court for two basic reasons: First, Petitioner asserts that the injunction was improperly granted because she did nothing wrong. That is, Petitioner argues that she has not refused to attend the medical exam. Second, Petitioner

asserts that since she already has been medically examined by a doctor of her choice in connection with the disability application, it is an invasion of her privacy to be examined by a doctor chosen by the Association.

Both of these arguments lack merit, as discussed below.

A. <u>The Petition Should Be Denied Because Petitioner Has Refused To Attend The Medical Exam, Thus Committing A "Wrongful Act".</u>

Petitioner argues that the injunction issued by the California trial court compelling her to attend a medical exam is unlawful. She contends that she did not refuse to attend the medical exam ordered by the Association on August 21, 1992 because no specific time or date were set by the Association for the exam. What Petitioner fails to mention is the

letter written by her attorney to the Association's attorney on or about June 4, 1992. In that letter, Petitioner's attorney states: "Mrs. Spaletta does decline to attend the examinations you have set up." See Appendix at A4.

At no time after issuance of the Association's August 21, 1992 order did Petitioner come forth to be examined. Despite repeated attempts to schedule the exam, Petitioner continued her refusal to be examined. That is why the Association was forced to file a complaint in the Superior Court seeking an injunction compelling Petitioner to attend the exam. Not once throughout the lower court proceedings did Petitioner simply request that a date be set for the exam.

Petitioner has fought the Superior

Court's order through two higher California Courts and now brings this matter before the U.S. Supreme Court. It is extremely disingenuous for Petitioner to claim that she has committed no "wrongful act" and has not refused to attend the medical exam, when she has fought the injunction through four court systems for the past two years.

B. **The California Statutes Have Been Properly Interpreted By The California Courts To Allow For More Than One Medical Exam During Retirement Disability Proceedings.**

There is no dispute that the Association has the obligation to make a determination about whether an applicant for disability retirement is in fact disabled from work. To make this determination, the State Legislature has provided, in California Government Code

§31723 (set forth at p.6 of Petition), that the Association may require certain proof of the applicant's medical condition. Section 31723 states that such proof may include a medical exam paid for by the applicant or a medical exam ordered by the Association.

Petitioner argues that this statute allows only one medical exam -- either one she pays for or one the Association pays for. She asserts that since she already has paid for an exam herself, the Association cannot require her to attend any further exams. She argues that any further medical exams will invade her privacy.

The California Courts ruled that Petitioner read §31723 too narrowly, and held that the Association had the power to acquire such proof as it felt

necessary to make a proper decision. The statute does not limit the Association to either an exam paid for by the applicant or an exam paid for by the Association. The statute says the Association may require such proof as it deems necessary, including applicant exams or Association exams.

It would not make sense to limit the evidence before the Association to the one exam paid for by the applicant. What if the applicant submitted a report from a physician not qualified in the area of the applicant's disability? What if the applicant had multiple disabilities, such as both orthopaedic and mental disabilities? Obviously, two exams would be needed in such a case. The California Courts recognized that the statute should not be read so narrowly that it would

prevent the Association from making intelligent decisions based on the evidence.

There is a constitutional right of privacy in the State of California, but that right must be harmonized with existing statutes. Petitioner's state of health is directly at issue. Whether she is mentally and physically capable of performing her job, or whether she is truly disabled, is directly at issue. The medical exam ordered by the Association and enforced by the California Superior Court and California Court of Appeal is not intended to invade Petitioner's privacy. The exam is intended to provide the Association with the evidence it needs, and to which by statute it is entitled, in order to carry out its duties. In such cases, there is

no wrongful invasion of privacy.

As stated by the California Court of Appeal in Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145, 162, 262 Cal. Rptr. 496 (1989):

> We also recognize that the California Constitutional right of privacy created by the 1972 amendment to our state constitution is not absolute. [Cites] As observed by the California Supreme Court, "'the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest.'"

[quoting from White v. Davis, 13 Cal. 3d 775, 864, 210 Cal. Rptr 94, 533 P. 2d 222 (1975).]

Since the Association has a compelling interest in making disability determinations based on sufficient evidence, the medical exam authorized by

statute, ordered by the Association, and compelled by the trial and appellate courts does not impermissibly interfere with Petitioner's privacy rights.

CONCLUSION

Petitioner's petition for writ of certiorari should be denied. This Court lacks jurisdiction to grant the petition, there has been no interference with any of Petitioner's constitutional rights, and the lower courts made appropriate rulings below.

DATED: June , 1994

Respectfully Submitted,

GRAHAM, CONE, McKINNEY
ROBERTS & JACKSON

By: _____

JONE LEMOS JACKSON
Post Office Box 1090
Mendocino, CA 95460
(707) 937-0503
Attorney for Respondent

APPENDIX

PHYL ALLEN DIRI
Attorney at Law
P. O. Box 763
Ukiah, CA 95482
(707) 468-5364

Anthony E. Graham, Esq.
Graham, Cone, McKinney, Roberts
& Jackson
45060 Ukiah Street
Mendocino, CA

Re: In re Application of Marsha Young

Dear Mr. Graham:

Government Code Section 31723 states:

> "The Board may require....a medical examination at the expense of the member, as it deems necessary or the board may [sic] upon its own motion may order a medical examination to determine the existence of the disability."

Mrs. Spaletta does not claim a psychiatric injury. You have obtained an order signed by Mr. Knudson that she see a psychiatrist. Inasmuch as she is only claiming a physical injury, I do not see that the board has any right whatsoever to request a psychiatric, rather than a medical, examination.

Also, I'd like to refer you to 58 CAL JUR 3d, "Statutes," Section 136:

> "Although, ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternative meaning, these words may sometimes be substituted for each other in construing statutes. But this substition is sanctioned only

> where such a construction is necessary to carry out the obvious intent of the legislature as gleaned from the context, or where the acts [sic] itself furnishes cogent proof of legislative substitution."

The word "or" in 31723 evidently means "or" in the ordinary sense. As I mentioned to you on the phone before you abruptly hung up on me, Mrs. Spaletta has had a medical examination at her own expense, she submitted the results to the board and to you in answer to interrogatories, and you took a lengthy deposition of her physician, Dr. Anderson, in Santa Rosa.

I shepardized 31723 and could find nothing to indicate to me that your implicit interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.

If you can send me authority for your interpretation, I will be glad to consider it.

If you cannot, then Mrs. Spaletta does decline to attend the examinations you have set up.

Sincerely,

/s/ Phyl Allen Diri

Phyl Allen Diri

PAD:hs

cc: Sandra Applegate, Deputy County Counsel

(3)

No. 93-2025

Supreme Court, U.S.
FILED
AUG 24 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION

and COUNTY OF MENDOCINO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

REPLY TO BRIEF IN OPPOSITION

JAMES REYER, ESQUIRE
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Santa Rosa, California 95402
(707) 576-1244

Counsel for Petitioner

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No. 93-2025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION

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REPLY TO RESPONDENT OPPOSITION

A. Nature of Case

This case is about the high cost to the legal system when a retirement board initiates litigation, under the guise of requesting an injunction against a disability pension applicant, based on transparent allegations of "fact," when the absence of substantiation of such allegations is conspicuous from the very documents of record to which the self-same allegations make reference.

This case is about the high cost to the integrity of the justice system when a Respondent composes for presentation to this Supreme Court a "wrongful act" of refusal from a document of record that (1), in the first instance, has no relation to the unsubstantiated refusal alleged in the second amended complaint

that is the subject matter of the state appellate court November 22 Decision under consideration in Petitioner's Petition and (2), in the second instance, addresses only the May 22, 1992 Tim Knudson administrative order that the state court of appeal in its November 22 Decision determined was found by the state trial court to be an illegitimate order. See Petition for Writ of Certiorari, Statement of the Case, Section C.1., at Pages 10 and 11, and Section C.4., at Page 15, footnote 2.

B. Brief in Opposition

1. Brief in Opposition Misquotes June 4, 1992 Letter.

Respondent in its Brief in Opposition presents to this Supreme Court as evidence of an alleged "wrongful act" of refusal on the part of Petitioner a letter received on June 4, 1992 (the "June 4, 1992 Letter"):

> "Petitioner argues that the injunction issued by the California trial court compelling her to attend a medical examination is unlawful. She contends that she did not refuse to attend the medical exam ordered by the Association on August 21, 1992 because no specific time or date [sic-or place] were set by the Association for the exam. What Petitioner fails to mention is the letter written by her attorney to the Association's attorney on or about June 4, 1992. In that letter Petitioner's attorney states: '<u>Mrs. Spaletta does decline to attend the examination s you have set up.</u>' (emphasis added)." See Appendix at A4.
>
> Respondent Brief in Opposition, at Pages 5 and 6.

The very June 4, 1992 Letter referred to at Appendix A4 to Respondent's Brief in Opposition conspicuously demonstrates the transparency of the allegation of the "fact" of the "wrongful act" of refusal by Petitioner presented by Respondent to this Supreme Court therein.

The absence of substantiation in Respondent's Brief in Opposition of the above allegation of refusal is conspicuous as a mis-quotation from the text of the

June 4, 1994 Letter from Petitioner's counsel, the very document to which the self-same allegation makes reference:

> "I shepardized 31723 and could find nothing to indicate to me that your interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.
>
> "If you can send me authority for your interpretation, I will be glad to consider it.
>
> "If you cannot, (emphasis added) then Mrs. Spaletta does decline to attend the examinations you (emphasis added) have set up."
>
> See Appendix, at Page A4, attached hereto.
> See also Respondent's Brief in Opposition, Appendix, at Page A4. (CT 17-18)*

Respondent in its Brief in Opposition submitted to this Supreme Court anticipates that this Court will not

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* The reference "CT" in this reply brief indicates herein the Clerk's Transcript in the state trial court record in this appeal. The reference "RT" herein means the Reporter's Transcript included in that record.

compare the Respondent's transparent allegation of a "wrongful act" of refusal in that brief with the text of the very document attached thereto to which the self-same allegation makes reference -- as the state court of appeal failed to compare Respondent's allegations in its briefs below to the documents of record before it in this case.

2. June 4, 1992 Letter addresses May 22, 1992 Tim Knudson administrative order, found by trial court to be an illegitimate order, not authorized by retirement association board of directors.

In addition, the state court of appeal found in its November 22 Decision that the May 22, 1992 Tim Knudson administrative order, the order addressed by the June 4, 1992 Letter from Petitioner's attorney, was determined by the state trial court to be an illegitimate order:

> "At the same, time the County applied to the Association on her behalf for disability retirement. Retirement

> Administrator Tim Knudson ordered Spaletta to submit to a medical examination. When Spaletta refused, the Association requested an injunction compelling her to attend the examination. The court sustained Spaletta's demurrer to the complaint, ruling that the Association's complaint failed to state a claim because an underlying administrative order was issued by the retirement administrator rather than the Association's board of directors."
>
> November 22 Decision, at Petition, Appendix Page A3.
>
> See Petition for Writ of Certiorari, Statement of the Case, Section C.1., at Pages 10 and 11, Section C.4, at Page 15, footnote 2, and November 22 Decision, at Appendix Page A3.

3. June 4, 1992 Letter evidences absence of substantiation of allegation of "wrongful act" of refusal before state trial court and state court of appeal.

The June 4, 1992 Letter introduced to this Court in Respondent's Brief in Opposition demonstrates the absence of substantiation of the allegation of the "fact" of wrongful refusal upon which Respondent initiated litigation, in the first instance, against Petitioner, a disability pension applicant who invokes

her pension rights for physical injuries sustained as a local county courthouse employee.[1]

Respondent's Brief in Opposition, in addition, ignores the face of documents that are central to the record in this case:

> "At no time after issuance of the Association's August 21, 1992 order did Petitioner come forth to be examined.[2] (footnote added) Despite

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[1] The June 4, 1992 Letter has no relevance to the second amended complaint, filed October 26, 1992, that is the subject of the state court of appeal November 22 Decision before this Court in Petitioner's Petition. The June 4, 1992 Letter, in addition, has no relevance to the first amended complaint, filed August 21, 1992, that the state trial court found on October 26, 1992 failed to state a cause of action on the sole basis that the retirement board had a remedy at law. (CT 242-243) (RT 34:1-2).

[2] The August 21 administrative order set no examination date, time or place to be examined. See Petition, at Appendix Pages A26-A27. See also Petition, Statement of the Case, Section C.2., at Page 12. The August 21, 1992 order that set no time, date or place for the second and third medical examinations was served on Petitioner on August 21, 1992, the same day that the first amended complaint, fictionally alleging Petitioner's non-

repeated attempts to schedule the exam, Petitioner continued her refusal to be examined.[3] (footnote added) That is why the Association was forced to file a complaint in the Superior Court seeking an injunction compelling Petitioner to attend the exam.[4] (footnote added) Not once throughout the lower court proceedings did Petitioner simply request that a date be set for the exam."[5] (footnote added)

---

compliance with the self-same administrative order, was filed with the state trial court.

[3] See footnotes 2 and 5. The fatuity of this allegation is evidenced at CT 183:1-10, 205:7-13.

[4] The original complaint in this litigation was filed on June 15, 1992 [over two (2) months prior to the August 21, 1992 administrative order], on the basis that the June 4, 1992 Letter, constituting the Appendix of Respondent's Brief in Opposition, was a refusal to attend medical examinations. The trial court, however, dismissed the original complaint on July 16, 1992, on the basis that the board of directors of the retirement board had not authorized "the examinations you have set up." (CT 112). (RT 8:17-13:13). See Pages 5 and 6 hereof.

[5] Petitioner offered at the August 12, 1992 meeting before the board of directors of the retirement association to attend a second medical examination by "an independent doctor and not one paid to deprive me of my retirement benefits." (CT 213, 215) (CT 203-205) (RT 30:27-31:3). The board of directors rejected that proposal and passed the August 12 motion requiring attendance at a single joint

REPLY ARGUMENTS

I. Petitioner's freedom to control intrusions to her bodily and psychological integrity, secured by Article I, Section 1, of the Constitution of the State of California, is not overcome by the showing of a compelling reason for governmental invasion of that protected individual interest in privacy, when the state court of appeal in its November 22 Decision neglects to evidence a showing of strict scrutiny in protecting Petitioner's constitutionally protected privacy interest.

A. Invasion of privacy interest requires (1) factual exposition of reasonable grounds supporting good or probable cause and (2) strict scrutiny of state statute introduced to justify invasion.

Invasion of Petitioner's zone of privacy, secured by Article I, Section 1, of the California Constitution, calls for

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medical examination with an insurance defense doctor and a psychiatrist, without setting a time, date or place therefor. See Petition, Statement of the Case, Section C.2., at Page 12. See also Petition, Appendix Page A24. See also June 4, 1992 Letter, at Appendix Pages A1-A4, attached hereto.

a factual exposition of reasonable grounds that will safely persuade an impartial tribunal that the request for such an invasion by an adversary (1) is not an abuse of a statutorily conferred right and (2) is not an abuse of Petitioner's constitutionally protected freedom to control intrusions to her bodily and psychological integrity. Division of Medical Quality v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55, 62. See also Petition, Statement of the Case, Section B., at Pages 8 and 9.

B. Statutory authorization for invasion of privacy interest requires strict scrutiny.

Reasonable grounds that will safely persuade an impartial tribunal to narrowly specify a compromise to Petitioner's zone of privacy must be sensitive to the contours of the individual's personal sovereignty:

> "The individual's right to privacy encompasses not only the state of his

mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones. The state of a person's gastrointestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP. We conclude the specie of privacy here sought to be invaded falls squarely within the protected ambit, the expressed objectives of Article I, Section 1. While the amendment does not prohibit all incursions into individual privacy, 'any such intervention must be justified by compelling interest' (White v. Davis, supra, 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 106, 533 P.2d 222, 234) and any statute authorizing invasion of such area of privacy must be subject to strict scrutiny." Division of Medical Quality v. Gherardini, supra, 93 Cal. App. 3d, at 679, 156 Cal. Rptr., at 61.

See also Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 841-848, 228 Cal. Rptr. 545, 548-553; Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 263, 220 Cal. Rptr. 577, 581.

C. Administrative burden does not establish a compelling state interest.

Well settled law in the State of California secures Petitioner's freedom to control intrusions to her privacy from administrative evaluation of her

application for disability retirement.[6] An administrative burden does not establish a compelling state interest which would justify the infringement of Petitioner's fundamental right to privacy, embodied in Article I, Section 1, of the Constitution of the State of California. Central Valley Ch. 7th Step Foundation v. Younger (1979) 95 Cal. App. 3d 212, 238, 157 Cal. Rptr. 117, 131-132. See also Wood v. Superior Court (1985) 166 Cal.

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[6] The allegation by Respondent that Section 31723 authorizes multiple medical examinations can not be said to satisfy the retirement board's fiduciary obligation to deal fairly and in good faith with Petitioner. See Hittle v. Santa Barbara County Employees Retirement Association (1985) 39 Cal 3d 374, 391-394, 216 Cal. Rptr. 733, 743-745, 703 P.2d 73, 83-85. Well settled law in the State of California prohibits the use in administrative adjudication, such as in the simple administrative review of an application for disability retirement, of civil discovery methods employable in plenary litigation under California Code of Civil Procedure § 2016 *et seq.* Romero v. California State Labor Commissioner (1969), 276 Cal. App. 2d 787, 790, 81 Cal. Rptr. 281, 284.

App. 3d 1138, 1146, 212 Cal Rptr. 811, 818-819.

II. Legislation by the state courts of California of a substantive right, under the guise of equity, for a county retirement board to order a second and possibly third medical examination "to determine whether Spaletta suffered injury during the course of employment", while failing to demonstrate factual exposition of such a right from the text of the state statute under review and failing to establish factual exposition of an elusive "wrongful act" of refusal to comply with such unfound right to sustain the invasion of Petitioner's privacy interest, renders the November 22 Decision arbitrary and capricious, inconsistent with Petitioner's rights to Due Process of Law, secured by the Fourteenth Amendment.

A. Legislation by state courts of a substantive right to conduct multiple medical examinations "to determine whether Spaletta suffered injury during the course of employment," under the guise of equity, is arbitrary and capricious and merely gives facial license to arbitrary state action.

Well settled law in the State of California holds that a state court may not create substantive rights under the

guise of doing equity - that a court may not confer substantive rights when the adversary who invokes equity has none. Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816, 819. See also Rosenberg v. Lawrence (1938) 10 Cal. 2d 590, 594-595, 75 P.2d 1082, 1084-1085.

From the standpoint of Due Process - the protection of the individual against arbitrary action - the withholding of evidential facts on which a court rests its conclusions renders hearings and appeals little more than empty forms designed to give facial license to arbitrary action. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302-304 (1937). Vachon v. New Hampshire, 414 U.S. 478, 480 (1974). See also Conservatorship of Valerie N. (1985) 40 Cal 3d. 143, 161-164, 219 Cal. Rptr. 387, 399-401, 707 P.2d 760, 772-774.

A hearing is not adequate in any judicial sense unless the evidence upon which the court relies in reaching its conclusions is known. Ohio Bell Telephone Co. v. Public Utilities Commission, supra, at 304. See also Morgan v. U.S., 298 U.S. 468, 480 (1936).

B. Factual exposition to justify second and possibly third medical examination "to determine the existence of the disability" absent from November 22 Decision.

The absence of factual exposition in the November 22 Decision to sustain the presence in a state statute of a substantive right for a county retirement board to order a second and possibly third medical examination "to determine the existence of the disability" and the conspicuous absence therein of the factual establishment of a "wrongful act" of refusal lay bare the conclusions of the state appellate court:

> "The board had a right to order a medical examination to determine

whether Spaletta suffered injury during the course of employment. (See Gov. Code, Section 31723.)(emphasis added) Her refusal to submit to the examination constituted a wrongful act."[7]

November 22 Decision. See Petition, at Appendix Page A7. See also Petition, Statement of the Case, Section C.4., at Pages 13 to 15, inclusive.

III. The issue of Due Process of Law and the unconstitutional application of California Government Code, Section 31723, to the facts of a second and third medical examination, establishing jurisdiction in this Court pursuant to 28 U.S.C. 1257,

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[7] The November 22 Decision here sidesteps the issue by finding that a single medical examination is authorized by Section 31723 "to determine whether Spaletta suffered injury during her course of employment," notwithstanding the express words of Section 31723, limiting the substantive right of a county retirement board to one that may require a single medical examination "to determine the existence of the disability." See Petition, Applicable Constitutional Provisions and Statute, at Page 6, Statement of the Case, Section C.4., at Pages 13 to 15, inclusive, and November 22 Decision, at Petition Appendix Page A7. Petitioner (not her adversaries) has the burden of proof in the administrative process at hand to prove the causal relationship between her physical injury and her employment activities. Lindsay v. County of San Diego Retirement Board (1964) 231 Cal. App. 2d 156, 160, 41 Cal. Rptr. 737, 740-741.

have been central to the decisions of record in this case from the time the retirement board practitioners initiated this injunctive litigation at the state trial court level, based upon the unsubstantiated wrongful act of refusal, misquoted from the text of the June 4, 1992 Letter, to the time the state court of appeal denied Petitioner's petition for rehearing of its November 22 Decision, rendering final and subject to appeal to the Supreme Court of the State of California on Due Process grounds the fact finding failures of that November 22, 1993 decision.

A. Supreme Court jurisdiction under 28 U.S.C. 1257 requires a state court decision that holds a state statute applicable to a particular set of facts against the contention that such application is invalid on federal grounds.

Clear decisions of this Court establish that a state statute is sustained and jurisdiction is conferred on this Court by 28 U.S.C. 1257, when a state court holds that statute applicable to a particular set of facts, as against the contention that such application is invalid on federal grounds. Volt Information Sciences, Inc. v. Board of Leland Stanford Junior University, 489

U.S. 468, 473 n. 4 (1989), citing *inter alia* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n. 3 (1963) and Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-290 (1921)

B. Petitioner raised the issue of her rights to Due Process of Law before the state trial court and before the state court of appeal with fair precision and in due time.

The failure of the state court of appeal to correct the absence of factual exposition in its November 22, 1993 Decision to justify the trial court's attempted invasion of Petitioner's bodily and psychological integrity was complete with the rejection of Petitioner's petition for rehearing before that court - on December 20, 1993.[8]

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[8] Petitioner had specifically referred to the state trial court's invasion of her constitutional right to privacy in her Consolidated Reply Brief, at Pages 12 and 13, filed with the state court of appeal more than two (2) months prior to that court's November 22 Decision. The attempt by Respondent to avoid the clear meaning of Section 31723 and to create substantive rights to conduct multiple medical

It is beyond question that the state court of appeal November 22 Decision that holds a state statute applicable to a particular set of facts, based on a record lacking any relevant facts as crucial elements to the application of that state statute violates Due Process and brings the necessary intendment of the November 22 Decision denying Petitioner's Due Process rights into the jurisdiction of this Supreme Court. See Vachon v. New Hampshire, supra, at 480.

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examinations in the face of the express text thereof, under the guise of doing equity, had previously been presented by Petitioner to the state trial court as an issue of unconstitutional delegation of powers and acknowledged by Respondent as a Due Process issue before the trial court. (CT 229) (RT 42-45).

Dated: August 23, 1994

Respectfully submitted

/s/ James Reyer, Esq.

James Reyer, Esquire
Post Office Box 5876
Santa Rosa, California
(707) 576-1244

Counsel to Petitioner

APPENDIX

JUNE 4, 1992 LETTER FROM PETITIONER'S COUNSEL REQUESTING LEGAL AUTHORITY THAT SECTION 31723 AUTHORIZES SECOND AND THIRD MEDICAL EXAMINATIONS WITH INSURANCE DEFENSE DOCTOR AND WITH PSYCHIATRIST (CT 17-18)

PHYL ALLEN DIRI
Attorney at Law
P. O. Box 763
Ukiah, CA 95482
(707) 468-5364

RECEIVED JUN 04 1992

Anthony E. Graham, Esq.
Graham, Cone, McKinney, Roberts
& Jackson
45060 Ukiah Street
Mendocino, CA

Re: In re Application of Marsha Young

Dear Mr. Graham:

Government Code Section 31723 states: "The Board may require . . . a medical examination at the expense of the member, as it deems necessary or the board may [sic] upon its own motion may order a medical examination to determine the existence of the disability."

Mrs. Spaletta does not claim a psychiatric injury. You have obtained an order signed by Mr. Knudson that she see a psychiatrist. Inasmuch as she is only claiming a physical injury, I do not see that the board has any right whatsoever to request a psychiatric, rather than a medical, examination.

Also, I'd like to refer you to 58 CAL JUR 3d, "Statutes," Section 136:

> "Although, ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternate meaning, these words may sometimes be substituted for each other in construing statutes. But this substitution is sanctioned only where a construction is

> "necessary to carry out the obvious intent of the legislature as gleaned from the context, or where the acts [sic] itself furnishes cogent proof of legislative substitution [sic]."

The word "or" in 31723 evidently means "or" in the ordinary sense. As I mentioned to you on the phone before you abruptly hung up on me, Mrs. Spaletta has had a medical examination at her own expense, she submitted the results to the board and to you in answer to interrogatories, and you took a lengthy deposition of her physician, Dr. Anderson, in Santa Rosa.

I shepardized 31723 and could find nothing to indicate to me that your interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.

If you can send me authority for your interpretation, I will be glad to consider it.

If you cannot, then Mrs. Spaletta does decline to attend the examinations you have set up.

Sincerely,

/s/ Phyl Allen Diri

Phyl Allen Diri

PAD:hs

cc: Sandra Applegate,

Deputy County Attorney